

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-cv-329-GKF(PJC)
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S REPLY IN FURTHER SUPPORT OF ITS MOTION IN
LIMINE TO PRECLUDE EXPERT TESTIMONY OF DEFENDANTS' WITNESS
BILLY CLAY**

Plaintiff, the State of Oklahoma ("the State") has moved, pursuant to Fed. R. Evid. 104 and 702, and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), for an order in limine precluding the expert testimony of Defendants' witness Billy Clay. In their response to the State's Motion (Dkt. # 2197)("Response"), Defendants attempt to explain how Dr. Clay, who is not an agricultural economist, should be permitted to testify regarding the opinions and work of an agricultural economist, and attempt to explain Dr. Clay's various flawed calculations. Defendants' arguments are without merit and fail to establish that Dr. Clay's opinions in this case satisfy the requirements of *Daubert*

I. Dr. Clay's expertise is clearly not in the areas for which he renders multiple opinions concerning significant issues in this case.

The parties agree that Dr. Clay is not an agricultural economist or agricultural engineer, and that he is, in fact, a veterinarian. *See e.g.* Response, pp. 5 (citing Dr. Clay's memberships in various veterinarian professional organizations). Yet, the opinions he provides in this case require expertise in the areas of agricultural economics and engineering in order to be reliable. Realizing that he lacked the requisite expertise, Dr. Clay relied upon the work of an agricultural

economist (Dr. Jobes) to assist him in forming his opinions. The State does not argue that Dr. Clay is unqualified to discuss matters involving veterinary medicine, but that he is not qualified to opine on the broad areas of agricultural economics and engineering in which he has proffered opinions in this case.

It is evident that the focus of Dr. Clay's work over the last forty years has been veterinary science and medicine. Dr. Clay's work history clearly reveals that since the 1960's he focused on veterinary and related teaching positions which in no way involved agricultural economics, and on being a consultant to large pharmaceutical companies writing proprietary (non-peer reviewed) papers to support their corporate goals. Examples from his list of qualifications include assistant and adjunct professor of *veterinary medicine* 1970 to present; Smith Kline and Pharmacia/Upjohn consultant 1973 to 2003. *See* Dkt. # 2197-2, pp. 35-36. Defendants also tout that in Dr. Clay's consulting work for a pharmaceutical company, he "participated" in studies involving analysis of manure. Response, p. 5. However, undefined "participation" in unknown studies of manure for a private company does not qualify him to opine about the broad areas he addresses in his report in this case.

Defendants point out that Dr. Clay has a masters' degree in agronomy, but like other areas touted by Defendants as experience and knowledge to support the opinions of Dr. Clay (such as toxicology, and veterinary medicine), this area simply is not relevant to the opinions in his expert report. In addition, Defendants' Response included an affidavit from Dr. Clay that references an attached list of articles that he believes demonstrate his relevant experience that were omitted from the disclosure of his publications because they are greater than 10 years old. *See* Dkt. #2197-10 Ex. F. However, many of the articles are about topics that have absolutely no bearing on the opinions contained in his report. For example, the articles address harvesting

sorghum, fungicidal control of seedlings, animal problems in grazing wheat, stocker syndrome, lead levels in beef, poisoning by plants, and nitrate accumulation in sorghum. These have nothing to do with the opinions he offers in this case.

Defendants also claim Judge Eagan “accepted” Dr. Clay’s testimony during *Daubert* hearings in the *City of Tulsa* case, but they fail to explain that the *Daubert* hearings, and the order they cite, did not pertain to Dr. Clay himself, but pertained to SWAT modeling offered by one of the plaintiff’s expert. Response, p. 5. Dr. Clay was one of several experts Defendants offered to critique certain factual assumptions supporting the SWAT modeling during the hearing on that modeling. The information he offered in regard to that particular model in that particular hearing does not establish that he is qualified to offer the various different opinions he proffers in this case.

II. Dr. Clay’s reliance on Dr. Jobes exceeds the allowable level of reliance by one expert upon another.

Defendants claim that it is appropriate that Dr. Clay relied heavily upon the work, expertise, and opinions of agricultural economist Dr. Jobes in reaching his opinions. The work of an agricultural economist like Dr. Jobes is not “of a type reasonably relied upon” by a veterinarian like Dr. Clay in forming inferences and opinions within his profession, and so is not a proper basis for an expert opinion. Fed. R. Evid. 703. Dr. Clay’s adoption and expansion upon the work of Dr. Jobes clearly reaches beyond the range of reliance that is acceptable under the case law cited by Defendants. *See TK-7 Corp. v. Barbouti*, 993 F.2d 722, 732 (10th Cir. 1993) (excluding opinions of proffered expert who adopted work of another individual that was outside his own expertise). Dr. Clay lacks the necessary qualifications to evaluate and incorporate Dr. Jobes’ work into his proffered testimony.

III. Dr. Clay's creative calculations for determining the numbers of poultry and cattle in the IRW do not satisfy the requirements of *Daubert*.

A. Defendants admit Dr. Clay's method for calculating cattle numbers was simply created by Dr. Clay and unique to this case.

Dr. Clay ignored scientifically accepted authorities and created his own formula for determining the number of animal units in the IRW when reliable data were readily available to him. Defendants provide a long-winded explanation of the calculation used by Dr. Clay, but they fail to cite any literature, articles, or authorities that support Dr. Clay's methodology. The only support Defendants can offer for Dr. Clay's method for calculating cattle and poultry number is that "Dr. Clay employs his unique expertise and knowledge of poultry and cattle production generally and specific to the IRW to determine numbers of poultry and cattle present in the watershed." Response, p. 14. This is an evasive and misleading way of saying that Dr. Clay simply invented this method, which does not have any level of acceptance in the scientific community beyond Dr. Clay himself.

In their attempts to defend Dr. Clay's novel method for determining the numbers of cattle in the IRW, Defendants argue that sales data from the Agricultural Census provided little usable information, and in support of this assertion, Defendants cite to Dr. Clay's deposition at 347:25-348:7. Response, p. 11; Ex 1 (Clay Dep. pp 347-328). This testimony simply does not support Defendants' argument. Likewise, the statement that Dr. Clay's methods provide real world data for the jury is not supported by Defendants' citation to Dr. Clay's deposition at 118:4-14. Response, p.13; Ex. 1 (Clay Dep. p 118).

Dr. Clay used Agricultural Census inventory numbers for cattle, but ignored the sales data contained within the inventory numbers of cattle. Instead of simply relying on the authoritative Agricultural Census data, Dr. Clay created a formula which included inflated

weights for cattle, and he disregarded data contained within the census. *See* Clay Dep., 336:17-25; 345:2-346:8; 347:11-348:7; *see also* Dkt. 2197-14, Ex. J (cattle and calves sold).

Dr. Clay claims he allocated the reported census numbers to an appropriate Animal Unit. (Dkt #2197 at 17). But in doing so, he changed the weight of the animals and the net effect results in an increase in the animals in the inventory. *See* Ex. 2197-3, Table C-2. For replacement heifers and bulls, he created a relationship between how many there would be versus cows that calved. *See id.* He assumed weights for the bulls and replacement heifers. *See id.* He used these relationships to increase the weight of all cows that calved from 1000 lbs to 1300 lbs. *See id.* His calculations assume all these cows produce manure at the rate that a 1300 lb cow would rather than at their likely weight of 1000 lbs. *See id.*

The flaw in Dr. Clay's methodology is that the replacement heifers and bulls are already counted in the Agricultural Census under the "other cattle" category. Ex. 1, Clay Dep. 335:13-22. "Other cattle" includes heifers, steers, calves, and bulls combined in the Agricultural Census.¹ Thus, while Dr. Clay did not change the numbers of cattle through his calculations, the net effect of his methodology is counting the replacement heifers and bulls twice, increasing the weight of all cows from 1000 to 1300 lbs, and computing waste from these same animals in the other cattle category.

In short, Dr. Clay created a novel method for counting animals which is untested, unpublished and not subjected to peer review, has no known potential rate of error, and lacks any level of acceptance. It results in an outcome weighted heavily in favor of Defendants' position.

¹ Dr. Clay assumed a weight of 750 lbs for the "other cattle" category, but he failed to justify this assumption.

His methodology, which was evidentially created for his use in this case simply does not pass muster under *Daubert*.

B. Dr. Clay's methodology and calculations to arrive at the number of poultry in the IRW is seriously flawed, incomplete and unreliable.

Defendants' Response attempts to justify Dr. Clay's unusual method for calculating poultry numbers in the IRW. Defendants' efforts fail to demonstrate that Dr. Clay's method is admissible under *Daubert*. Dr. Clay used zip code based data to determine the number of birds in the IRW, and he admitted there are many instances in which birds are not reported in that data set. Nonetheless he chose to use it as the basis for his opinions. Ex. 1, Clay Dep. 124:14-19; 327:6-10; 328:20-23; 329:7-12, 16-20; 330:17-21. During his deposition, Dr. Clay was asked to review one of the zip codes within the IRW to illustrate the obvious failures in his methodology. Dr. Clay testified he thought there were only two farms missing in that particular zip code, but the facts demonstrated a much greater underestimate on the part of Dr. Clay. Ex. 1, Clay Dep. 331:8-332:3. Dr. Clay admitted he failed to count over 6 million broilers and 2.2 million turkeys in that single zip code area. *See* Dkt #2061 at 5. In their Response, Defendants attempt to gloss over this glaring omission by stating that grower Steve Butler's poultry waste is not land applied in the IRW. Response, p. 16. Defendants' effort to explain away Dr. Clay's gross underestimate with this one grower fails because in addition to Butler's poultry houses, there were 8 or 9 additional poultry growers not accounted for by Dr. Clay in that particular zip code. *See* Ex. 2, Clay dep. Ex. 50 (identifying additional growers in the zip code).

There are approximately 27 additional zip code areas in the IRW listed in the Agricultural Census that indicate poultry production may not be reported due to confidentiality reasons similar to the exemplar zip code discussed above. Dr. Clay's answer to these omissions is "[w]e

knew there would be some underestimate in a few places but we were looking at a gross estimate to begin with.” Ex. 1, Clay Dep. 330:5-332:3; Ex. #38. This hardly explains away the obvious inaccuracies that plagued Dr. Clay’s methodology, or why he failed to use other available and reliable sources for the data, which include the Defendants’ own records.

Defendants’ attempts to defend Dr. Clay’s methodology for determining poultry numbers in the IRW fail. Dr. Clay used a method he knew was not reliable or accurate. Furthermore, Dr. Clay admitted that the method he used in this case for counting poultry in the IRW was not a method of calculating bird production that he had performed previously. Ex. 1, Clay Dep. 119:10-13. Even knowing his work was less than accurate, Dr. Clay did no margin of error calculations and simply accepted underestimating the number of poultry in several zip codes. Ex. 1, Clay Dep. 329:25-330:4. Furthermore, Defendants have failed to demonstrate that Dr. Clay’s method has been or can be tested, whether it has been published or peer-reviewed, and whether it has any acceptance in the field. Thus, Dr. Clay’s testimony must be excluded under *Daubert*.

IV. Clay’s methodology and calculation to arrive at the amount of poultry waste generated in the IRW is not only flawed from the inception, but was manipulated in an effort to decrease the total attributed to poultry.

Defendants’ response to the State’s arguments regarding Dr. Clay’s dry litter calculations focuses on the fact that poultry litter is generally dried to some extent in a poultry house. Response, pp. 19-20. Defendants’ arguments on this general point are not responsive to the State’s criticism of Dr. Clay. The State argued that the method Dr. Clay invented and implemented to calculate dry poultry waste was unnecessary because the data for dry waste already existed in generally accepted literature, and that his opinions should be excluded because his methods are unreliable and caused him to significantly underestimate waste in his

calculations. Dr. Clay disregarded the Agricultural Handbook's definition of total solids for poultry litter and instead applied an additional drying or "fermentation" factor to waste that is by definition already dry. This results in Dr. Clay reducing total solids in poultry litter from 26.5 lbs. /day /1000 lbs. of animals to 13.77 lbs. /day /1000 lbs. of animals. *See* Ex. 3, Excerpt of Clay Report Appendix G note 4. The end result of this is that Dr. Clay reduced the amount of poultry waste constituents deposited on the fields in the IRW to distort the relative amount of waste deposited by cattle compared to poultry.²

Dr. Clay's calculation of the dry weight of poultry waste is severely flawed and is not consistent with the accepted scientific practices for computing waste masses. Table 4-14 of the Agricultural Handbook reports "Poultry waste characterization -- as excreted" while Table 4-15 reports "Poultry waste characterization -- litter". *See* Dkt. # 2061-3, Ex. 3, Agricultural Waste Management Field Handbook, Ch. 4. Table 4-14 reports a value of total solids in manure (manure dry weight) as excreted of 20.00 lbs/day/1000 lbs of broilers. Table 4-15 reports a value of total solids in litter (includes waste excreted by broilers and bedding material) of 26.50 lbs/day/1000 lbs of broilers. Therefore, this value of 26.50 represents a dry weight in the manure and bedding produced by broilers. This value is the appropriate value to use in computing the dry weight of waste produced by broilers.

Dr. Clay's flawed computation for broilers is highlighted in his Appendix G, Note 4 of his report. *See* Ex.3, Excerpt of Clay Report Ex. G, Note 4. Instead of using this available and generally accepted data from the handbook, Dr. Clay performs a series of flawed and slanted

² The Court will recall that during the preliminary injunction hearing, Dr. Clay used a chart to compare **wet** cattle manure to **dry** poultry litter. *See* P.I. Hearing Trans., March 7, 2008, Vol. VI, pp. 1655-1659, 1663-1664. What he has now done in his expert report is to use a made up concept not supported in science to fabricate a similar distorted comparison.

calculations to determine the value of dry weight poultry manure. Dr. Clay reports these values in note 4 of Appendix G. His calculations are flawed in several ways. First, the reported value for “weight of litter” used by Dr. Clay is not the weight of litter for broilers. *See* Dkt. # 2061-3, Ex. 3, Table 4-15 (weight of litter is reported as 35.00 and the moisture percent is reported as 24.00). Dr. Clay incorrectly computes “manure in litter at cleanout” by computing a ratio of organic matter (bedding) and using this to obtain “manure in litter at cleanout (at 24% moisture).” The value he computes is 18.11 lb/day/1000 lbs broilers. This calculation uses an incorrect value for weight of litter and further assumes that this litter has a moisture content of 24%. At this step in the calculation, Dr. Clay has already reduced waste ($20.00 - 18.11 = 1.89$) and further has assumed his value of 18.11 to contain 24% moisture while the definition of this value clearly indicates otherwise.

Next, Dr. Clay incorrectly adjusts his value of 18.11 to remove moisture. In doing so, he obtains a value of 13.77 that he reports as “manure in litter at cleanout (dry matter basis).” *See* Ex. 3, Excerpt of Clay Report, Ex. G, note 4. Table 4-14 reports broiler total solids value at 20.00. *See* Dkt. #2061-3, Ex. 3, Table 4-14. Dr. Clay performs a series of incorrect calculations and obtains a value of 13.77 when the well-established and correct value that he purports to compute (20.00) is already reported in Table 4-14. His analysis is further flawed in that he has also removed the bedding materials from the waste. These materials are mixed with the poultry excrement and contain nutrients and other contaminants. *See* Dkt. #2061-3, Ex. 3, Table 4-15. The bedding material becomes part of the overall waste that is land applied. The correct value of waste removed on a dry weight basis is 26.50 lbs/ day / 1000 lbs broilers. *See id.* Rather than using this well-established and generally accepted value, Dr. Clay performs a series of flawed calculations that result in a value of 13.77 lbs. / day / 1000 lbs. broilers.

The impact of Dr. Clay's flawed calculation of the dry weight of broiler waste is that the amount of dry broiler waste is less than 52 % of the actual value $((13.77/26.50) * 100 = 51.96\%)$. If Dr. Clay had used the correct value from Table 4-15 to compute the dry weight of broiler waste, he would have obtained a value that was nearly double the value he obtained. His methodology is unproven, untested, and lacks acceptance in any field. Thus, his opinions which rely on these calculations must be excluded

V. Dr. Clay's criticism of Meagan Smith's Mass balance is outside his expertise and should be stricken.

Defendants argue Dr. Clay's opinions about the State's experts' mass balance opinions is admissible citing, *Smith v. Ingersoll-Rand*, 214 F.3d 1235, 1245-46 (10th Cir. 2000). However, Dr. Clay admits he has no experience performing a mass balance and has not received any education or training in calculating a mass balance. See Dkt #2061 at p 3. Dr. Clay's admission that his knowledge and experience in this area is limited to a single conversation and reading four articles hardly qualifies him as an expert. See Dkt. #2197-10, Para. 6 & Ex. B. It should be noted the materials relied on by Dr. Clay and found at Dkt #2197-10 were *not* within Dr. Clay's considered materials. Dr. Clay is totally unqualified in this area; his opinions concerning mass balance should be excluded.

VI. Conclusion

For the reasons set forth herein, and in the State's Motion, the methods used by Dr. Clay are outside his area of expertise, and contain substantial errors and assumptions which render them unreliable. Dr. Clay's opinions will not assist the trier of fact, but will only confuse the issues in this case as he attempts to explain and justify his unaccepted, unproven and untested methods. Dr. Clay's testimony should be excluded pursuant to *Daubert*.

Respectfully Submitted,

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